

Ling Ten Yew; ex p Bersama Diri Edar Sdn Bhd

A

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO MT1-29-503 OF 1998
SURIYADI J
26 JUNE 2002

Bankruptcy — *Notice* — *Setting aside* — *Affidavit to set aside bankruptcy notice did not disclose counterclaim, set off or cross demand* — *Notice to oppose petition and affidavit in opposition not conforming to statutory form* — *Whether notice to oppose petition could be treated as an affidavit pursuant to r 95 of the Bankruptcy Rules 1969* — *Bankruptcy Rules 1969 rr 18, 94, 95, (1), 117, Form 7* — *Bankruptcy Act 1967 s 3(1)(i)*

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Sometime in 1995, a bankruptcy action filed by the judgment creditor was struck out ('the first bankruptcy action'). Then, on 25 August 1999, the pending judgment creditor's petition (encl 6) ('the second petition') was filed. Subsequently, the judgment debtor filed the necessary 'notice by debtor of intention to oppose petition' against the second petition (encl 8A) according to r 117 of the Bankruptcy Rules 1969 ('the Rules') and an 'affidavit in opposition' (encl 8B) not mandated by r 117. The judgment creditor posed a preliminary objection as regards encl 8A and 8B on the ground that they did not comply with rr 94 and 95 of the Rules in that encl 8A did not mention the judgment debtor having any counterclaims, set offs or cross demands, and thus r 18 should be adhered to. The judgment debtor then filed a summons in chambers (encl 14) praying, inter alia, for an order that he be at liberty to file and serve it together with an affidavit in support to dismiss the judgment creditor's second petition. This application was dismissed and the judgment debtor appealed.

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Held, dismissing the appeal and encl 14 with costs:

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(1) A bankruptcy notice which must be founded on a final judgment or order against the judgment debtor, may be set aside by way of filing an affidavit in Form 7 of the Rules pursuant to r 95(1) or by filing a summons in chambers supported by affidavit pursuant to r 18. Any ground that does not fall within the sphere of s 3(1)(i) of the Bankruptcy Act 1967 read together with rr 94 and 95, must fall within the ambit of r 18's application (see pp 209A–B, 210D–E); *Datuk Lim Kheng Khim v Malayan Banking Bhd* [1993] 2 MLJ 298 followed.

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(2) Enclosures 8A and 8B did not adhere to the format of Form 7, let alone there being no statutory defences deposed as required under s 3(1)(i) of the Bankruptcy Act 1967, read together with r 94. The argument of the judgment debtor that the judgment creditor had paid the delayed costs, only after encl 8A and 8B had been filed could also not stand scrutiny as the judgment debtor never at the outset complied with the factual and statutory requirements. Since the judgment debtor had failed to disclose any counterclaim, set off or cross demand as required by s 3(1)(i) of the Bankruptcy Act 1967, the requirements of r 94 had not been

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- A fulfilled. Enclosure 8A could not be treated as an affidavit pursuant to r 95, which could operate as an application to set aside the bankruptcy notice (see p 209F–H).
- (3) The format and substance of encll 8A and 8B must have been the result of some misinterpretation of the provisions of the Bankruptcy Act on the part of the judgment debtor. The court concluded that encl 8A was never intended to be an affidavit as envisaged by r 95, but was intended as a notice by the debtor to oppose the petition pursuant to r 117 and no more. Enclosure 8B fell under the same category as encl 8A in clear terms affirmed that the reasons were stated in that affidavit (see pp 209I–210B).
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[Bahasa Malaysia summary]

- D Sekitar tahun 1995, satu tindakan kebangkrapan yang difailkan oleh pemiutang penghakiman telah dibatalkan ('tindakan kebangkrapan pertama'). Kemudian, pada 25 Ogos 1999, petisyen pemiutang penghakiman yang belum selesai (lampiran 6) ('petisyen kedua') telah difailkan. Selepas itu, penghutang penghakiman telah memfailkan 'notice by debtor of intention to oppose petition' yang perlu terhadap petisyen kedua (lampiran 8A) menurut k 117 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah tersebut') dan satu 'affidavit in opposition' (lampiran 8B) tidak memberikan mandat kepada k 117. Pemiutang penghakiman mengemukakan satu bantahan awal berhubung lampiran-lampiran 8A dan 8B atas alasan bahawa keduanya tidak mematuhi kk 94 dan 95 Kaedah-Kaedah tersebut di mana lampiran 8A tidak menyebut tentang penghutang penghakiman mempunyai apa-apa tuntutan balas atau penepian, dan oleh itu k 18 hendaklah dipatuhi. Penghutang penghakiman kemudiannya telah memfailkan satu saman dalam kamar (lampiran 14) memohon, antara lain, untuk satu perintah bahawa beliau bebas untuk memfail dan menyampaikan bersama dengan satu affidavit sokongan untuk menolak petisyen kedua pemiutang penghakiman. Permohonan ini telah ditolak dan penghutang penghakiman telah membuat rayuan.
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Diputuskan, menolak rayuan dan lampiran 14 tersebut dengan kos:

- (1) Satu notis kebangkrapan yang dibuat berdasarkan satu penghakiman atau perintah muktamad terhadap penghutang penghakiman, boleh diketepikan melalui pemfailan satu affidavit dalam Borang 7 Kaedah-Kaedah tersebut menurut s 95(1) atau melalui pemfailan satu saman dalam kamar yang disokong oleh affidavit menurut k 18. Apa-apa alasan yang tidak terlingkung dalam sfera s 3(1)(i) Akta Kebankrapan 1967 dibaca bersama kk 94 dan 95, seharusnya terlingkung dalam permohonan k 18 (lihat ms 209A–B, 210D–E); *Datuk Lim Kheng Khim v Malayan Banking Bhd* [1993] 2 MLJ 298 diikuti.
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- (2) Lampiran-lampiran 8A dan 8B tidak mematuhi format Borang 7,

apalagi di mana tiada pembelaan statutori yang dideposkan sebagaimana yang dikehendaki di bawah s 3(1)(i) Akta Kebankrapan 1967, dibaca bersama k 94. Hujah penghutang penghakiman bahawa pemiutang penghakiman telah membayar kos-kos yang lewat dibayar, hanya selepas lampiran-lampiran 8A dan 8B telah difailkan juga tidak boleh diambilkira kerana penghutang penghakiman tidak pernah pada permulaannya lagi mematuhi keperluan faktual dan statutori. Memandangkan penghutang penghakiman telah gagal untuk mengemukakan apa-apa tuntutan balas atau penepian sebagaimana yang dikehendaki oleh s 3(1)(i) Akta Kebankrapan 1967, keperluan k 94 tidak dipenuhi. Lampiran 8A tidak boleh dianggap sebagai satu affidavit menurut k 95, yang boleh beroperasi sebagai satu permohonan untuk mengenyahkan notis kebangkrutan tersebut (lihat ms 209F–H).

- (3) Format dan kandungan lampiran-lampiran 8A dan 8B mungkin telah terhasil daripada salah tafsir peruntukan-peruntukan Akta Kebankrapan 1967 di pihak penghutang penghakiman. Mahkamah memutuskan bahawa lampiran 8A tidak pernah bertujuan menjadi satu affidavit sebagaimana yang dibayangkan oleh k 95, tetapi bertujuan bertindak sebagai notis oleh penghutang untuk membangkang petisyen tersebut menurut k 117 dan itu sahaja. Lampiran 8B terlingkung di bawah kategori yang sama kerana lampiran 8A dalam terma yang jelas mengesahkan bahawa sebab-sebab tersebut telah dinyatakan dalam affidavit (lihat ms 209I–210B).]

Notes

For cases on setting aside of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1766–1785.

Cases referred to

Datuk Lim Kheng Khim v Malayan Banking Bhd [1993] 2 MLJ 298 (folld)

Khoo Chee Tong, Re; ex p Unik (M) Sdn Bhd [1996] 5 MLJ 39 (refd)
Malayan Banking Bhd v Datuk Lim Kheng Khim [1992] 2 MLJ 540 (refd)

Noordzi bin Mohd Ismail; ex p Bank Bumiputra Malaysia Bhd [1993] MLJU 284 (refd)

Nyana Pandithan, Re; ex p Muniamah d/o Narayanan & Ors [1993] MLJU 276 (refd)

Yong Chooi Fong, Re [1992] 2 CLJ 1262 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)

Bankruptcy Rules 1969 rr 18, 94, 95, 117, Form 7

- A** *KH Ho (CK Lee & Assoc)* for the judgment creditor/respondent.
PH Ong (Syarikat Radhakrishnan) for the judgment debtor/appellant.

Suriyadi J: Sometime in 1995, the judgment creditor had filed bankruptcy action 29–2689–95 (‘the first bankruptcy action’), subsequently to be struck off on 12 December 1996, with costs to be taxed. On 25 August 1998, the pending judgment creditor’s petition (encl 6, ‘the second petition’), was filed. Knowing that at the hearing of the petition he would not be allowed to show cause against the petition, unless intention had been given to oppose the petition, the judgment debtor on 27 January 1999 had filed the necessary ‘notice by debtor of intention to oppose petition’ against the second petition (encl 8A; r 117 of the Bankruptcy Rules 1969). In support of encl 8A, the judgment debtor went a step further by filing an ‘affidavit in opposition’ (encl 8B), the latter being the supporting documentary evidence that was not mandated under r 117. This rule reads:

- D** Where a debtor intends to show cause against a petition he shall file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute ...

The format to be followed as regards the notice of intention to oppose the petition will be that as in Form 16, and to this the judgment debtor has faithfully adhered to (see below reproduced).

- E** The judgement debtor subsequently filed another summons in chambers to stay any bankruptcy proceedings pending the settlement of the issue of costs connected to the first bankruptcy action. This stay of execution application was withdrawn only after the judgment creditor had made payments on 25 March 1999. From the facts, it was quite clear that encll 8A and 8B were filed only a few months before the costs payments were resolved.

- G** With the dust having settled, the judgment creditor later intimated that it intended to pose a preliminary objection as regards encll 8A and 8B, on the ground that they did not comply with the requirements of rr 94 and 95 of the Bankruptcy Rules 1969 (‘the Rules’). To appreciate why this objection was taken up, it is necessary for me to reproduce the relevant portion of the ‘notice by debtor of intention to oppose petition (encl 8A as per Form 16). It reads:

NOTICE BY DEBTOR OF INTENTION TO OPPOSE PETITION

- H** In the matter of a bankruptcy petition presented against me ... on 25 August 1998 by Bersama Diri Edar Sdn Bhd of ... Kuala Lumpur.

I, the above judgment debtor, do hereby give notice that I intend to oppose ... for the reasons stated in my affidavit filed herein and shall contend that the sum claimed is *res judicata*, misleading and an abuse of process of court and thereby a nullity.

- I** Dated this 14th day of January 1999

... tt ...

Ling Ten Yew

The emphasis in the above notice revolved around the sum being claimed pursuant to the final judgment indicated in the bankruptcy notice, it being res judicata, misleading and an abuse of the process of court. Parties agreed that under r 95, the filing of an affidavit, together with all the preconditions being fulfilled as per Form 7 sufficed to operate as an application to set aside the bankruptcy notice. The judgment creditor ventilated that r 94, which must be read together with r 95, required an affidavit affirming the judgment debtor having a counterclaim, set off or cross demand ('the three statutory defences') which equalled or exceeded the amount of the judgment debt. On the face of encl 8A, nothing was mentioned of any of these statutory defences. The judgment creditor alleged that as the grounds supplied therein were not founded on them, what with the format adverted to being flawed, the judgment debtor's application therefore should be dismissed. With the grounds of objection not being any of those three statutory defences, the invocation and adherence of the requirements of r 18 became imperative. Rule 18 reads:

- (1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit ...

In principle, unless otherwise provided for, the above provision of r 18 would be alluded to by any applicant after the presentation of the judgment creditor's petition, for certain orders in the like of applications for security for costs, substituted service, stay of execution, consolidation of duplicated proceedings, rescission of a receiving order, adjudication order after the rejection of a proposed composition or scheme by creditors etc.

Returning to the facts of this case, as the judgment creditor had alleged that as the objection of the judgment debtor was pursuant to r 95, but without complying with the statutory defences of r 94, read together with s 3(1)(i) of the Bankruptcy Act 1967, and encl 8A and 8B being mere affidavits, the judgment debtor's mode of opposition thus was flawed. In the alternative, by virtue of the defences being non-statutory as adverted to in encl 8A, the judgment debtor should have instead resorted to r 18, to object to the bankruptcy notice. Perhaps recognizing his flaw and acquiescing to the threat, the judgment debtor had subsequently filed a summons in chambers (encl 14) praying, inter alia, for an order that he be at liberty to file and serve it, together with an affidavit in support, to dismiss the judgment creditor's second petition. At the senior assistant registrar's stage on 30 March 2000, the latter dismissed the application, hence the appeal before me filed by the frustrated judgment debtor.

It was quite clear that had it not been for the threat of the preliminary objection, encl 14 would never have been filed, and the second petition would have proceeded solely on its merits. So, in the circumstances of the case, was the judgment debtor therefore right in filing encl 14? The supposed reasons supplied in the 'affidavit in opposition' (encl 8B) included the issue of the unpaid costs pursuant to the first bankruptcy proceedings, inclusive of the said issues of res judicata, the sum claimed being misleading and it being an abuse of the process of court. But it was clear on the face of

- A** the record that encl 8A never made any mention of the non-payment of the costs pursuant to that first bankruptcy proceeding, let alone the statutory defences.

It is trite that a bankruptcy notice which must be founded on a final judgment or order against the judgment debtor, may be set aside by way of filing an affidavit in Form 7 of the Rules pursuant to r 95(1) (*Re Yong Chooi Fong* [1992] 2 CLJ 1262; *Re Nyana Pandithan; ex p Muniamah d/o Narayanan & Ors* [1993] MLJU 276; *Re Khoo Chee Tong; ex p Unik (M) Sdn Bhd* [1996] 5 MLJ 39), or by filing a summons in chambers supported by affidavit pursuant to r 18. The format of Form No 7 reads as follows:

- C** No 7
(Rule 95)
(TITLE)

AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY
NOTICE

I, ... of ... affirm and say:

- D** 1 That I was, on the ... day of ..., served with the notice hereunder annexed (or describe the notice).

That I have satisfied the judgment debt claimed by ... (state nature of satisfaction).

Or

- E** 2 That I have a counterclaim (or set off or cross demand) for ... being a sum equal to (or exceeding) the claim of the said ... in respect of (here state grounds of counterclaim).

- 3 That I could not have set up the said counterclaim (or as the case may be) in the action in which the said judgment was obtained against me.

- F** Affirmed at etc ...

From the above, it was quite clear that encll 8A and 8B did not adhere to the above supplied format, let alone there being no statutory defences deposed as required under s 3(1)(i) of the Bankruptcy Act 1967, read together with r 94.

- G** The argument of the judgment debtor that the judgment creditor had paid the delayed costs only after encll 8A and 8B had been filed, and thus had defeated the latter, could also not stand scrutiny as the judgment debtor never at the outset complied with the factual and statutory requirements, as clarified above. With the above findings, I had to conclude that since the judgment debtor had failed to disclose any counterclaim, set off or cross demand as required by s 3(1)(i) of the Bankruptcy Act 1967, then the requirements of r 94 had not been fulfilled. With that shortcoming, encl 8A could not be treated as an affidavit pursuant to r 95, which could operate as an application to set aside the bankruptcy notice.

- H** Additional to the above conclusions, I must state that the format and substance of encll 8A and 8B, which were a far cry from the prerequisites of rr 94 and 95, must have been the result of some misinterpretation of the provisions of the Bankruptcy Act 1969 on the part of the judgment debtor.
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Scrutinizing encl 8A, I could not help but conclude that this enclosure was never intended at the outset to be an affidavit as envisaged by r 95. It was my finding of fact that encl 8A was actually intended as a notice by the judgment debtor to oppose the petition pursuant to r 117 and no more. Enclosure 8B fell under the same category as encl 8A in clear terms affirmed that the reasons were stated in that affidavit. Somewhere along the way, the judgment debtor had quietly but unilaterally ‘converted’ encll 8A and 8B, to be his application affidavit to set aside the bankruptcy notice pursuant to r 95, instead of filing fresh ones. The comedy of errors rattled the judgment debtor when the judgment creditor indicated his dissatisfaction with the judgment debtor’s unusual methodology, which thenceforth saw the filing of encl 14. Strangely enough, no admission of this error was ever made in open court, or for that matter, in the latter enclosure.

Courts have not hesitated from lamenting that in certain circumstances the mere filing of an affidavit of opposition would be inappropriate, and thus requiring the challenge to be made by some other mode (*Noordzi bin Mohd Ismail; ex p Bank Bumiputra Malaysia Bhd* [1993] MLJU 284; *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540). The only alternative method of setting aside the bankruptcy notice available will be by way of summons in chambers supported by affidavit pursuant to r 18. It is my view that any ground that does not fall within the sphere of s 3(1)(i) of the Bankruptcy Act 1967 read together with rr 94 and 95 of the Rules, must fall within the ambit of r 18’s application. The above view is now solidly entrenched in the case of *Datuk Lim Kheng Khim v Malayan Banking Bhd* [1993] 2 MLJ 298 where the Supreme Court had opined that, in the circumstances of that case, the judgment debtor should have made a formal application by motion supported by an affidavit in compliance with the then r 18 (prior to 11 March 1993, an application filed was by way of notice of motion). In the above case, similar to the current one under discussion, the judgment debtor’s ‘affidavit in opposition’ had jumbled up every conceivable ground of opposition, except the existence of a counterclaim, set off or cross demand (statutory defences).

During the submission, the judgment debtor attempted to argue additionally that the non-adherence of the requirements of the provisions was procedural in nature, and never at any time had prejudiced the interests of the judgment creditor. That being so, he should be given the opportunity to fall back on r 18, by filing and serving encl 14, which would salvage his position. I had to bear in mind that the judgment debtor had been given ample warning pertaining to the flaws of encll 8A and 8B, but had never attempted to rectify them. Instead of admitting to the mistakes, the judgment debtor preferred to argue that there was absolutely nothing wrong with them, format or substance wise. If there was nothing wrong with them, why then file encl 14 in the first place? Having considered the law, the delay on the part of the judgment debtor to act, his unwillingness to admit to his mistake which went all the way to the day when encll 8A and 8B were filed, the taxed costs of RM4,590.10 which did not equal or exceed the bankruptcy notice sum of RM41,621.63, and not being oblivious of the draconian effect of a bankruptcy proceeding, in the circumstances of the

A case, as the ‘affidavit in opposition’ was ineffective and bad in law, I also rejected this additional argument. Mohamed Dzaiddin SCJ on this point (as his Lordship then was) in *Datuk Lim Kheng Khim v Malayan Banking Bhd*, had occasion to remark at p 305:

B In our opinion, failure on the part of the appellant to follow r 18 renders his ‘affidavit in opposition’ *ineffective and bad in law* because unless the court otherwise directs, challenges to the creditor’s petition or bankruptcy notice other than that he has a counterclaim, set off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. (Emphasis added.)

C At the end of the day, after considering the law and the facts of the case, I had no hesitation in dismissing this appeal, inclusive of encl 14, with costs.
Appeal and encl 14 dismissed with costs.

Reported by Chew Phye Aun

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